

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL FAUSTINA,

Defendant-Appellant.

UNPUBLISHED

July 19, 2011

No. 296928

Wayne Circuit Court

LC No. 09-023496-FC

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a bench trial, defendant appeals from his conviction of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a), for which he was sentenced to a prison term of 38 months to 15 years. We affirm.

Defendant first argues that he is entitled to a new trial because he was the recipient of ineffective assistance of counsel. Because defendant did not raise this issue in the trial court, our review is limited to errors apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, defendant must “show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

Defendant specifically argues that defense counsel was ineffective for failing to impeach the victim regarding two aspects of her testimony. Decisions regarding how to cross-examine and impeach witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

We agree that defense counsel could have impeached the victim’s trial testimony that she screamed and that defendant did not try to stop her with her prior testimony that she screamed and that defendant put his hand over her mouth. However, it was at least equally effective to impeach the victim with the fact that her trial testimony alone was inconsistent and to elicit her

admission that she could not explain the inconsistencies, which counsel raised during closing argument. Because the witness was subjected to rigorous cross-examination, defense counsel's failure to impeach the witness on *all* contradictory aspects of her preliminary examination and trial testimony was not a serious mistake but for which defendant would have had a reasonably likely chance of acquittal. *McFadden*, 159 Mich App at 800. Further, because the trial court found the victim credible based largely on her demeanor and her description of the sexual assault itself, despite the inconsistencies in her testimony, it is not reasonably likely that the court would have acquitted defendant had the victim been impeached on one other point regarding whether she spoke or was silent.

We likewise disagree with defendant that the victim's trial testimony regarding when and why she disclosed the incident when she did conflicted with her prior testimony. At the preliminary examination, counsel's question as phrased, when taken in context, can be understood as asking why the victim chose that particular day in December 2008 to tell her cousin as opposed to any other day. The victim was never expressly asked why she had waited a year to reveal what had happened, so her trial testimony explaining why she waited to make the disclosure was not inconsistent with her prior testimony. Counsel was therefore not ineffective for failing to "impeach" her with that testimony.

Defendant also argues that defense counsel was ineffective for failing to call him to testify at trial. A criminal defendant has a constitutional right to testify. *People v Simmons*, 140 Mich App 681, 683-684; 364 NW2d 783 (1985). While the decision whether to call the defendant to testify is generally a matter of trial strategy, *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986); *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984), the defendant retains the ultimate authority to decide whether to testify, *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). Thus, the defendant has the right to testify even if counsel disagrees with that decision. *Simmons*, 140 Mich App at 685. Counsel has the responsibility to advise the defendant "of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide[.]" and violation of that responsibility can constitute ineffective assistance. *United States v Teague*, 953 F2d 1525, 1533-1535 (CA 11, 1992).

After the prosecution rested, defense counsel stated, "I've had an opportunity to discuss this matter with Mr. Faustina, he has elected not to testify in this case; is that correct, Mr. Faustina?" Defendant replied, "Yes, sir." Hence, the record shows that defense counsel spoke to defendant about testifying, but does not show what advice counsel gave him. Accordingly, it does not establish that counsel provided inadequate or incorrect advice regarding defendant's decision to testify. And, defendant's purported affidavit does not entitle him to relief. First, the document is unsigned and unsworn and is of no evidentiary value. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005); MCR 2.119(B)(1). Second, even if the document had been executed, it cannot be considered because review is limited to the existing record, defendant's affidavit is not a part of that record, and defendant cannot expand the record on appeal. *People v Seals*, 285 Mich App 1, 20-21; 776 NW2d 314 (2009); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

In any event, the affidavit does not support a claim that defense counsel was ineffective, as it neither sets forth the substance of counsel's advice nor does it set forth what information

defendant was unable to convey to counsel, or how counsel's alleged lack of interest affected defendant's decision to testify. Defendant's affidavit also does not identify the substance of any testimony that he would have given if called as a witness at trial, other than to indicate that he has no knowledge of the event at which the victim claimed the sexual assault occurred. Without a further offer of proof of defendant's proposed testimony, there is no basis for concluding that defendant was prejudiced by his failure to testify. Defendant has failed to establish that counsel was constitutionally ineffective.

Defendant's second issue on appeal is that the trial court erred in scoring five points for OV 3, MCL 777.33. The scoring of the sentencing guidelines variables is determined by reference to the record, using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Thus, this Court reviews the trial court's scoring decision to determine whether the court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

OV 3 considers "physical injury to a victim." MCL 777.33(1). A score of five points is proper where the victim incurred "[b]odily injury not requiring medical treatment." MCL 777.33(1)(e). The court must "award the highest number of points possible under OV 3" *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005). In *People v Endres*, 269 Mich App 414, 417-418; 711 NW2d 398 (2006), we indicated that a five-point score would have been proper where "the victim experienced rectal pain as a result of defendant's assaults," but for the fact that "there was no record evidence to support the score." In this case, the victim's trial testimony that defendant committed a sexual act that "hurt" supported the five-point score. Therefore, the trial court did not abuse its discretion in scoring OV 3 at five points.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause